

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JAY CODILLA, an individual,)
)
Plaintiff,)
)
vs.)
)
CTX MORTGAGE COMPANY, LLC, a)
Delaware limited liability company; BANK OF)
AMERICA CORPORATION, a North Carolina)
corporation; COMMERCE TITLE COMPANY)
OF AMERICA, LLC, a Delaware limited)
liability company; AURORA LOAN)
SERVICES, LLC, a Delaware limited liability)
company; TIMOTHY M. BARTOSH, an)
individual; PRLAP, INC., a North Carolina)
corporation; KELLER WILLIAMS REALTY,)
INC., a Texas corporation; MERSCORP INC.)
d/b/a MORTGAGE ELECTRONIC)
REGISTRATION SYSTEMS, INC., a Virginia)
corporation; DOES I-X; and ROE)
COMPANIES I-X, inclusive,)
)
Defendants.)

Case No.: 2:10-cv-01469-RLH-PAL

ORDER

(Motion to Dismiss-#6;
Motion to Dismiss-#12;
Motion to Dismiss-#18)

Before the Court is Defendants CTX Mortgage Company, Timothy M. Bartosh, and PGP Title, Inc.'s (formerly known as Commerce Land Title, Inc., and improperly referred to as Commerce Title Company of America, LLC) (collectively, the "CTX Defendants") **Motion to Dismiss** (#6), filed September 22, 2010. The Court has also considered Plaintiff Jay Codilla's Opposition (#19), filed October 8, 2010, and the CTX Defendants' Reply (#24), filed October 18, 2010.

Also before the Court is Defendants Bank of America, N.A. (improperly referred to as Bank of America Corporation) and PRLAP, Inc.'s (collectively, the "BOA Defendants") **Motion to Dismiss** (#12), filed September 30, 2010. The Court has also considered Codilla's Opposition (#23), filed October 18, 2010, and the BOA Defendants' Reply (#26), filed October 28, 2010.

Finally before the Court is Defendants Aurora Loan Services, LLC, and Merscorp, Inc.'s ("MERS") (collectively, the "Aurora Defendants") **Motion to Dismiss** (#18), filed October 7, 2010. The Court has also considered Codilla's Opposition (#25), and the Aurora Defendants' Reply (#27), filed November 4, 2010.

BACKGROUND

On November 22, 2006, Plaintiff Jay Codilla purchased a single family home in North Las Vegas, Nevada (the "Property"). Codilla financed the purchase with a \$252,000.00 loan from CTX (the "First Mortgage"). The CTX loan was secured by a deed of trust on the Property. On December 8, 2006, Codilla obtained a home equity line of credit (the "HELOC") through Bank of America, which was also secured by a deed of trust on the Property. In February 2007, CTX transferred the First Mortgage to Aurora. Sometime thereafter Codilla defaulted on the First Mortgage. Accordingly, Aurora foreclosed on the First Mortgage and eventually purchased the Property at a trustee's sale on May 12, 2010. Two days later Codilla received an eviction notice from Keller Williams.

Codilla filed this lawsuit on August 30, 2010, asserting the following claims: (1) declaratory relief; (2) injunctive relief; (3) breach of the implied covenant of good faith and fair dealing, contractual breach; (4) violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*; (5) violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*; (6) rescission; (7) fraud; (8) Unfair and Deceptive Acts and Practices ("UDAP"); (9) lack of standing; (10) breach of fiduciary duty; (11) unconscionability—UCC § 2-302; (12) predatory lending; and (13) quiet title. Each claim is against all of the Defendants, except the lack of

standing claim, which is only against MERS. All Defendants except Keller Williams subsequently filed a motion to dismiss. To date no proof of service has been filed as to Keller Williams. For the reasons discussed below, the Court grants Defendants' motions.

DISCUSSION

I. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949 (internal citation omitted).

In *Iqbal*, the Supreme Court recently clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 1949. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, plaintiff's complaint must be dismissed. *Twombly*, 550 U.S. at 570.

1 **II. Analysis**

2 Codilla has agreed to voluntarily dismiss his claims for declaratory relief, injunctive
3 relief, and quiet title. Therefore, the Court need not address those claims. Also, unless otherwise
4 stated, the following analysis applies to all Defendants.

5 **A. Breach of the Covenant of Good Faith and Fair Dealing**

6 Under Nevada law, “[e]very contract imposes upon each party a duty of good faith
7 and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 784
8 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To state a valid claim
9 for contractual breach of the covenant of good faith and fair dealing, a plaintiff must show: (1)
10 plaintiff and defendant were parties to a contract; (2) defendant owed a duty of good faith to
11 plaintiff; (3) defendant breached that duty by performing in a manner that was unfaithful to the
12 purpose of the contract; and (4) plaintiff’s justified expectations were thus denied. *Perry v.*
13 *Jordan*, 900 P.2d 335, 338 (Nev. 1995).

14 Codilla’s complaint alleges that he and Defendants were parties to a contract for the
15 First Mortgage and the HELOC, and that Defendants violated the spirit and purpose of those
16 contracts by willfully withholding numerous disclosures regarding those contracts. However,
17 these allegations only deal with alleged conduct before these contracts were entered into. And this
18 Court has previously held that a “party cannot breach the covenant of good faith and fair dealing
19 before a contract is formed.” *Urbina v. Homeview Lending, Inc.*, 681 F.Supp.2d 1254, 1260 (D.
20 Nev. 2009) (citing *Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 941
21 (2d Cir. 1998) (“an implied covenant relates only to the performance of obligations under an
22 extant contract, and not to any pre-contract conduct”)). Thus, to the extent Codilla’s claim
23 revolves around alleged conduct that occurred before the contract was entered into, it fails as a
24 matter of law.

25 Codilla further alleges that while he was attempting to modify the First Mortgage
26 Aurora and MERS proceeded to foreclose on the Property. However, neither Aurora nor MERS

1 were contractually obligated to provide Codilla with a loan modification. Therefore, Codilla has
2 failed to state a valid claim because he does not allege that Aurora and MERS violated the terms of
3 the First Mortgage. Accordingly, the Court dismisses Codilla's claim for breach of the covenant
4 of good faith and fair dealing.

5 **B. TILA**

6 In general, TILA requires creditors to disclose certain information about the terms
7 of a loan to the prospective borrower. *See e.g.*, 15 U.S.C. §§ 1631–32, 1638; 12 C.F.R. § 226.17.
8 Damages claims under TILA must be brought within one year from the date of the occurrence of
9 the violation. 15 U.S.C. § 1640(e). However, equitable tolling may apply if the plaintiff can show
10 fraudulent concealment on the part of the defendant. *King v. California*, 784 F.2d 910, 915 (9th
11 Cir. 1986). Rescission claims, on the other hand, must be brought within three years from the date
12 of the consummation of the transaction or upon the sale of the property, whichever occurs first.
13 15 U.S.C. § 1635(f). However, the Supreme Court has held that, unlike a claim for damages, a
14 rescission claim cannot be tolled. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 417 (1998).

15 Codilla seeks both damages and rescission under TILA. Codilla alleges that
16 Defendants violated TILA by failing to provide him with accurate material disclosures, among
17 other things, as TILA requires. However, both of Codilla's loans closed in 2006 and this suit was
18 commenced in August 2010—almost four years later. Therefore, the limitations period has run for
19 both damages and rescission under TILA. Furthermore, the Court finds that equitable tolling is not
20 appropriate for the damages claim because Codilla has not shown fraudulent concealment on the
21 part of the Defendants. Therefore, because the limitations period has expired, Codilla's TILA
22 claims fail as a matter of law and are dismissed.

23 **C. RESPA**

24 In general, RESPA requires that borrowers receive disclosures regarding the costs
25 associated with real estate closings and prohibits certain practices in the real estate business such
26 as undisclosed kickbacks. 15 U.S.C. §§ 2601–2617. However, any RESPA action must be

1 brought within either one or three years from the date of the occurrence of the violation depending
 2 on the alleged violation. *Id.* at § 2614. Thus, because Codilla's loans closed in 2006 and this suit
 3 was commenced almost four years later in August 2010, Codilla's RESPA claim fails as a matter
 4 of law. The Court refuses to apply the doctrine of equitable tolling for the same reason stated in its
 5 TILA analysis. Therefore, the Court dismisses Codilla's RESPA claim.

6 **D. Fraud**

7 In order to state a claim for fraud in Nevada, a plaintiff must allege that (1) the
 8 defendant made a false representation; (2) the defendant knew or believed the representation to be
 9 false; (3) the defendant intended to induce plaintiff to rely on the misrepresentation; and (4) the
 10 plaintiff suffered damages as a result of his reliance. *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382,
 11 1386 (Nev. 1998). Rule 9(b) of the Federal Rules of Civil Procedure further requires that in
 12 "alleging fraud or mistake, a party must state with particularity the circumstances constituting
 13 fraud."

14 Codilla's fraud claim fails under Rule 9(b). Codilla merely alleges that Defendants
 15 "engaged in conduct" calculated to deceive him. However, he doesn't specify what this conduct
 16 was other than to say that Defendants unlawfully suppressed facts and made no effort to determine
 17 if Codilla had the ability to repay the loan. Codilla makes no specific allegation of any false
 18 representations by Defendants. Therefore, the Court dismisses Codilla's fraud claim for lack of
 19 specificity.

20 **E. Unfair and Deceptive Practices Act**

21 Codilla's eighth cause of action is premised on the alleged violation of the "Federal
 22 Unlawful and Deceptive Acts and Practices statutes," although he doesn't cite any particular
 23 federal statute. (Dkt. #1, Compl. 19:27–28, 20:1–2.) However, in this motion Codilla now claims
 24 that this cause of action is premised on the alleged violation of NRS §§ 598 and 598A. The Court
 25 finds this to be a disingenuous attempt to amend a complaint outside of the proper procedural
 26 process. Thus, because a "motion to dismiss 'addresses the present state of the pleadings, not what

1 an amended complaint might state,” the Court dismisses this claim. *Lingad v. IndyMac Fed.*
 2 *Bank*, 682 F. Supp. 2d 1142, 1151 (E. D. Cal. 2010).

3 **F. Lack of Standing**

4 Codilla’s ninth cause of action alleges that MERS does not have standing to
 5 foreclose because it lacks a beneficial interest in the First Mortgage. However, this Court has
 6 previously held that “so long as the note is in default and the foreclosing trustee is either the
 7 original trustee or has been substituted by the holder of the note or the holder’s nominee, there is
 8 simply no defect in foreclosures, at least in states such as Nevada where a trustee may foreclose
 9 non-judicially.” *Weingartner v. Chase Home Fin., LLC*, 702 F.Supp.2d 1276, 1280 (D. Nev.
 10 2010). Thus, because Codilla has defaulted on the loan, and because MERS is the designated
 11 nominee on the deed of trust (Dkt. #6, Mot. to Dismiss Ex. A, Deed), Codilla’s claim for lack of
 12 standing fails as a matter of law. Therefore, the Court dismisses this claim.

13 **G. Breach of Fiduciary Duty**

14 To state a valid claim for breach of fiduciary duty, a plaintiff must show: (1) the
 15 defendant owed a fiduciary duty to the plaintiff; (2) the defendant breached that fiduciary duty; and
 16 (3) the plaintiff sustained damages. *Mosier v. S. Cal. Physicians Ins. Exch.*, 74 Cal. Rptr. 2d 550,
 17 565 (Cal. Ct. App. 1998). “A fiduciary relationship exists between two persons when one of them
 18 is under a duty to act for the benefit of another upon matters within the scope of the relation.”
 19 *Stalk v. Mushkin*, 199 P.3d 838, 843 (Nev. 2009). However, courts have repeatedly held that a
 20 lender owes no fiduciary duties to a borrower absent exceptional circumstances, such as when a
 21 special relationship exists between the two parties. *See Yerington Ford, Inc. v. Gen. Motors*
 22 *Acceptance Corp.*, 359 F. Supp. 2d 1075, 1090 (D. Nev. 2004) (stating “the Court is satisfied that
 23 the Nevada Supreme Court would hold that an arms-length lender-borrower relationship is not
 24 fiduciary in nature, absent exceptional circumstances”), *aff’d in relevant part by Giles v. Gen.*
 25 *Motors Acceptance Corp.*, 494 F.3d 865 (9th Cir. 2007). In this case, Codilla has only alleged the

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1 existence of a lender–borrower relationship with Defendants, which is insufficient to establish a
 2 fiduciary relationship. Therefore, Codilla’s claim fails as a matter of law.

3 **H. Unconscionability**

4 Unconscionability is an affirmative defense that allows a court to refuse to enforce
 5 a provision or an entire contract to avoid unfair terms, it is not a cause of action. *Premiere Digital*
 6 *Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp. 2d 1161, 1168 (D. Nev. 2005). Furthermore, this claim
 7 relies on UCC § 2-302 (codified in Nevada as NRS § 104.2302), which only applies to the sale of
 8 goods. *See* NRS 104.2107, 104.2105. Therefore, the Court dismisses this claim.

9 **I. Predatory Lending**

10 Codilla’s twelfth cause of action is a predatory lending claim against all
 11 Defendants. However, this claim is based entirely upon broad generalizations and conclusory legal
 12 statements. While Rule 8 does not require detailed factual allegations, it demands “more than
 13 labels and conclusions.” *Iqbal*, 129 S. Ct. at 1949. Therefore, the Court dismisses this claim.

14 **III. Keller Williams**

15 On January 26, 2011, this Court issued a notice of intent to dismiss Keller Williams
 16 pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. Rule 4(m) requires service of
 17 process to be served upon a defendant within 120 days after the filing of the complaint. Codilla
 18 filed his complaint on August 30, 2010, and to date, no proof of service has been filed as to Keller
 19 Williams. Therefore, the Court dismisses Keller Williams from this case.

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CONCLUSION

Accordingly, and for good cause appearing,

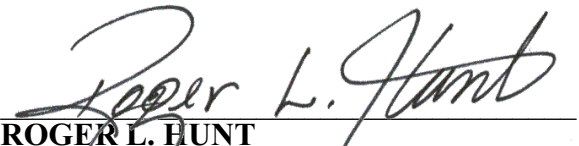
IT IS HEREBY ORDERED that the CTX Defendants' Motion to Dismiss (#6) is
GRANTED.

IT IS FURTHER ORDERED that the BOA Defendants' Motion to Dismiss (#12) is
GRANTED.

IT IS FURTHER ORDERED that the Aurora Defendants' Motion to Dismiss (#18)
is GRANTED.

The Court orders the Clerk of Court to close the case.

Dated: February 17, 2010


ROGER L. HUNT
Chief United States District Judge